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## The 1987 Amendments to the Montana Workers' Compensation Act -- From the Employer's Perspective

Bradley J. Luck  
*Partner at Garlington, Lohn & Robinson*

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# THE 1987 AMENDMENTS TO THE MONTANA WORKERS' COMPENSATION ACT—FROM THE EMPLOYER'S PERSPECTIVE

Bradley J. Luck\*

## I. THE SETTING

In January of 1985, Governor Schwinden appointed a special advisory council to study the workers' compensation system in Montana and suggest appropriate revisions.<sup>1</sup> This review was sorely needed as a result of many factors. The Montana workers' compensation system had become too expensive,<sup>2</sup> too litigious<sup>3</sup> and too unpredictable.<sup>4</sup> The system was in turmoil. To discount the significance of such a state of affairs is to ignore the economic and legal reality of the situation. The short term benefit to claimants and their attorneys which resulted from the hyperextension of the historical limits of the system would have, if left unchecked, most severely impaired the rights and benefits of future claimants.

Those who argue that the system needed no change or, incredibly, was too restrictive, fail to grasp the obvious. Higher costs and loss ratios beyond one hundred percent<sup>5</sup> cause increased premiums

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\* B.A., University of Montana, 1974; J.D., University of Montana, 1977; Partner, Garlington, Lohn & Robinson, Missoula.

1. Exec. Order 1-85, Office of the Governor, State of Montana (Jan. 15, 1985). The council was made up of 18 members selected by the Governor to represent all interest groups involved in the workers' compensation system. In May of 1985, Executive Order 1-85 was amended by Governor Schwinden to change some of the individuals serving on the 18-member council. Amend. to Exec. Order 1-85, Office of the Governor, State of Montana (May 13, 1985).

2. For example, between fiscal years 1977 and 1986, the annual cost of claims with the State Compensation Insurance Fund increased 577%, from 9.5 million to 64.3 million dollars. During this same period, the number of claims increased by only 67%. McKINNEY, REPORT OF THE MONTANA OFFICE OF THE LEGISLATIVE FISCAL ANALYST TO THE LEGISLATIVE FINANCE COMMITTEE at 9-10 (Apr. 6, 1988). These figures document a significant increase in the cost of the system as well as an amazing increase in the cost per claim. Such conclusions exist regardless of one's opinions on the reason for the present unfunded liability in the State Fund.

3. According to data provided by the Workers' Compensation Court, Helena, Mont., petition filings in fiscal years 1981 totaled 211, 1982 totaled 351, 1983 totaled 405, 1984 totaled 437 and 1985 totaled 646.

4. One need only count the number of Workers' Compensation Court decisions and appellate decisions dealing with workers' compensation cases between the late seventies and 1985. Regardless of one's philosophical bent and independent of one's opinion as to the propriety of the direction, any objective analysis indicates a significant judicial expansion of concepts in workers' compensation during the period.

5. Loss ratios reflect the percentage of benefit cost over premium received. Loss ratios for all private workers' compensation carriers in Montana were 125% in 1985 and 161% in 1986. For the period 1984-1987, the largest private carrier in the state had a loss ratio of

to employers. Increased business expenses affect continuation in business, discourage new business and detract from the number of wage earners in the state. Less profits, fewer employees and fewer businesses create innumerable pressures on the Montana economy that affect all working people, injured and healthy. No small part of Montana's poor business reputation and inability to attract new jobs is directly related to the various problems caused by the workers' compensation system.<sup>6</sup>

In his charge to the council, Governor Schwinden requested that the study and subsequent recommendations be "people sensitive and cost conscious."<sup>7</sup> This dual objective created a difficult balancing act. After eighteen months of detailed study the council presented the Governor with its recommendations for change. The reform package was far reaching and appeared to represent the compromise necessary to meet appropriately the challenge presented by the Governor.<sup>8</sup>

The Schwinden administration chose to present to the legislature a reform package of its own.<sup>9</sup> Many of the fundamental portions of the package were either identical to council recommendations or closely resembled them. A number of the reform proposals were vastly different.<sup>10</sup> In the end a bill was passed that again was the product of compromise.

Some may argue that the final reforms were solely a government and industry pillage of workers. This position evidences a lack of appreciation for the underlying problem. It also ignores the fact that many far reaching and more drastic potential reform possibilities were considered and scrapped by those seeking the

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151%. MCKINNEY, *supra* note 2, at 6-7. The counterpoint article in this issue (*see*, Trieweller, *The New Workers' Compensation Act—Something for All Montanans to Be Ashamed of*), which claims that the State Fund rates are competitive and that this fact proves the point that premiums are not too high in the state fails to consider one critical fact. The State Fund is almost 200 million dollars in the hole. If it charged rates which were actuarially sound, the rates would be substantially higher than they are and would far exceed the other states mentioned in the survey.

6. The cost of doing business in Montana includes, in addition to high insurance premiums for workers' compensation, comprehensive general liability and premises liability, a payroll tax of 0.3% earmarked to reduce the State Fund's unfunded liability.

7. Exec. Order 1-85, Office of the Governor, State of Montana (Jan. 15, 1985).

8. WORKERS' COMPENSATION ADVISORY COUNCIL, RECOMMENDATIONS FOR CHANGES IN THE MONTANA SYSTEM, June 23, 1986 [hereinafter RECOMMENDATIONS]. (The legislative proposals were introduced by Senator Fred Van Valkenburg, Missoula, Mont..)

9. S.B. 315, 50th Sess.

10. The original administration proposal sought, among other things, to abolish the Workers' Compensation Court and create an administrative adjudication process with district court review. *Id.* Interestingly, the administration proposal rejected the Governor's Council's decision to reduce the maximum duration of permanent partial disability benefits to 325 weeks. RECOMMENDATIONS, *supra* note 8, at 11.

amendments because of the legitimate balancing process that was undertaken.<sup>11</sup>

The amendments to the Workers' Compensation Act are pervasive.<sup>12</sup> Estimates of dollar savings to the system resulting from the 1987 amendments range from twenty to twenty-five percent. A legitimate analysis of the savings will take a number of years. Court interpretations and later legislative modifications create significant contingencies.

The task of analyzing the amendments from a defense perspective could be an impossible one if approached from a good law/bad law perspective. It is too simplistic to examine the changes on the basis solely of dollars to the claimant. If it were feasible, no one would argue against maximum compensation for individuals injured in the course and scope of their employment. The stark reality of the matter is that the total dollars in the system had to be reduced. The true measure of the amendments must be in terms of the balancing of interests and creation of a structure that delivers fair and effective benefits to those most in need.

In addition, a discussion of the changes in the Act, or even of the provisions that existed before 1987, cannot be developed from the perspective of making the claimant "whole." The workers' compensation system is not akin to the general tort system. A number of trade-offs between employers and employees form the foundation of the system. As Professor A. Larson notes:

Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy.

Among common-law trained lawyers and judges, it has naturally been the tort-connection fallacy that has been most prevalent.<sup>13</sup>

We must remember that certain fundamental societal choices were made in developing the American workers' compensation sys-

11. For example, the 500 week maximum duration of permanent partial disability benefits was reinstated. Court abolition was forsaken and informal dispute resolution and mediation requirements were instituted. As discussed *infra* at notes 37 through 39 and accompanying text, a number of benefit increases were included in the package. S.B. 315, 50th Sess., ch. 464, 1987 Mont. Laws 1.

12. The Workers' Compensation Act became effective July 1, 1987. Act of April 14, 1987, ch. 464, 1987 Mont. Laws 1092.

13. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 1.20 (1985). It should also be noted that the Montana Constitution excepts employer liability to workers, where proper coverage is in place, from "full legal redress" concepts. MONT. CONST. art. II, § 16.

tem. Society has chosen to provide adequate no-fault coverage to employees, free of charge, to insure that a safety net is available guaranteeing a certain level of relief for work injuries. Society thereby saves the cost of caring for such individuals through its social programs. Society does not and cannot avoid dealing with the cost of the program, and so spreads it throughout the commercial community.<sup>14</sup> Society makes value judgments, though, in balancing the cost of the system against the benefits to be received. There is not and cannot be an unlimited supply of such benefits. No system could accomplish or afford the goal of making an injured person "whole." Again, the system, and therefore the amendments to our Act, can be analyzed only by balancing all of the various interests involved.

There are a number of significant changes in the new Act, and it is impossible to detail all of them within the scope of the present article. For our purposes, a review of four critical areas—policy, injury definition, benefits and dispute resolution—is undertaken.

## II. POLICY

The legislature specifically set out its declaration of policy in amending the Act.<sup>15</sup> The specified objective of the reform package

14. Professor Larson notes:

And so, by this simple demonstration of alternatives, we see that workmen's compensation, far from being a violation of moral principle, is in fact the only morally satisfactory solution of the problem of the injured workman, once one concedes that morality has a group as well as an individual aspect. Of course, not every compensable injury is of the severity to present the poorhouse as an alternative to compensation, but the principle for lesser injuries is the same: There is an attempt to ensure that the claimant continues to receive the bare minimum income and medical care to keep him from destitution. The ultimate "social philosophy," then, behind nonfault compensation liability is the desirability of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source.

LARSON, *supra* note 13, at § 2.20.

15. MONT. CODE ANN. § 39-71-105 (1987), states:

(1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suf-

was to provide fair compensation for industrial injuries. However, right from the outset the lawmakers indicated that the cost of the system precludes making all injured workers whole. Return to work is given a priority status as is the speedy and effective delivery of benefits.<sup>16</sup>

Tough problems often require tough choices. The balancing of interests envisioned by the introductory statements permeate the revisions which follow. Regardless of our philosophical bent or chosen professional direction, we are compelled to accept such direction as fair and appropriate.

Fearing that its attempt to revise the Workers' Compensation Act comprehensively would suffer the same fate as its past piecemeal attempts, the legislature, in the policy section of the new law, abolishes liberal construction.<sup>17</sup> Quite appropriately, the legislature indicated its desire that the Act be applied by the courts as written. Although such direction may, in reality, be more ceremonial than substantive, the effort legitimately reiterates a needed direction of quick, sure and predictable benefits.

The philosophical direction evidenced by the policy section and the actual amendments which follow it serve to shake the mindset that had developed in our workers' compensation system and the people in it. That mindset, nudged along by the courts, presumes some unquestioned cradle-to-grave, carte blanche obligation of employers for all physical conditions that befall employees within the ever expanding net of coverage and benefits. The new law gives notice that workers have rights, but so do employers; that fair compensation is not boundless; and that it is in everyone's long-term interest to reel in the cost and scope of the system.

### III. DEFINITION OF INJURY

Over the years the scope of what constituted a compensable industrial injury expanded much further than any statutory

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ferred a work-related injury or disease.

(3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

(4) Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party.

16. MONT. CODE ANN. § 39-7-105(2), (3) (1987).

17. MONT. CODE ANN. § 39-71-105(4) (1987).

amendment to the definition.<sup>18</sup> The result was unduly costly to the system.<sup>19</sup> For a number of reasons, the court expansion of the definition fostered the unpredictability and inequitable results which begged for reform.<sup>20</sup>

With the judicial decision to compensate repetitive trauma,<sup>21</sup> it became difficult to draw lines between occupational disease,<sup>22</sup> injury, the natural aging process of older workers and non-occupationally caused problems. The definition may have become so broad that a number of clearly compensable occupational diseases became defined as injuries by pursuing what appeared to be a logical thought process to an unrealistic conclusion.<sup>23</sup> It became effectively impossible to disprove an aggravation because the claimant's burden of proof regarding the possibility of aggravation or acceleration<sup>24</sup> was virtually always maintainable. Finally, the courts concluded that in the tough causation cases the claimant need not be constrained by a lack of medical science and could prevail on questionable probabilities.<sup>25</sup>

In addition, it was becoming increasingly apparent that new frontiers in relation to cardiovascular problems and stress in the workplace, so called "mental-mental" and "mental-physical" cases, were about to be charted.<sup>26</sup> The cost, scope and difficulty of such additional expansions was, to many, unpalatable absent legislative approval.

18. See *infra*, notes 22-27 and accompanying text. In fact, prior to the 1987 amendments, the definition of "injury" had not been modified by the legislature since 1973.

19. The judicial expansions, whether appropriate or not, significantly expanded compensability and therefore increased cost, many times years after the event in question. Since no premium was or could be collected under such circumstances this course accounted for large losses.

20. Decisions such as those cited *infra*, notes 22-27, created an atmosphere where it was quite difficult to determine the extent of the definition.

21. See *Hoehne v. Granite Lumber Co.*, 189 Mont. 221, 615 P.2d 863 (1980).

22. See *McMahon v. Anaconda Co.*, 208 Mont. 482, 678 P.2d 661 (1984).

23. See *Bremer v. State Compensation Ins. Fund*, No. 8407-2557, slip op. (Workers' Comp. Ct. June 27, 1985), *aff'd*, *Bremer v. Buerkle*, \_\_\_ Mont. \_\_\_, 727 P.2d 529 (1986) (without discussing particularly the extended rationale of the Hearing Examiner).

24. See, e.g., *Viets v. Sweet Grass County*, 178 Mont. 337, 583 P.2d 1070 (1978); *Standberg v. Reber Co.*, 179 Mont. 173, 587 P.2d 18 (1978).

25. *Conway v. Blackfeet Indian Developers, Inc.*, 205 Mont. 459, 669 P.2d 225 (1983); *Lamb v. Missoula Imports, Inc.*, 211 Mont. 360, 684 P.2d 498 (1984); see also *Hengel v. Pacific Hide & Fur Depot*, \_\_\_ Mont. \_\_\_, 730 P.2d 1163 (1986).

26. "Mental-mental" refers to situations where mental problems are caused by mental, rather than physical, stimuli. Likewise, "mental-physical" cases involve physical conditions attributed to non-physical causes. See *Tocco v. City of Great Falls*, \_\_\_ Mont. \_\_\_, 714 P.2d 160 (1986); *Ferdinand v. Lodge #456*, \_\_\_ Mont. \_\_\_, 719 P.2d 775 (1986); *Gulbraa v. Alco Energy Prod's.*, \_\_\_ Mont. \_\_\_, 731 P.2d 1302 (1987); *Snyder v. San Francisco Feed & Grain*, \_\_\_ Mont. \_\_\_, 748 P.2d 924 (1987).

The new definition of injury is significant.<sup>27</sup> It retains the accepted concepts of traumatic incident or unusual strain, but requires that the event, or series of events, occur on a single day or work shift. As such, the definition reemploys one of the classic differentiations between injury and disease, time definiteness.<sup>28</sup> By also expanding the definition of occupational disease, consistency between the two Acts was fostered.<sup>29</sup>

The new definition does not appear to preclude a claimant's previous right to elect between coverage under the Workers' Compensation Act or Occupational Disease Act under appropriate circumstances.<sup>30</sup> However, a single work shift aggravation would have to be proven, as do all aggravations under the new law, by a preponderance of the medical evidence.<sup>31</sup>

By reimposing the classic differentiation between injury and

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27. MONT. CODE ANN. § 39-71-119 (1987), states:

- (1) "Injury" or "injured" means:
  - (a) internal or external physical harm to the body;
  - (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
  - (c) death.
- (2) An injury is caused by an accident. An accident is:
  - (a) an unexpected traumatic incident or unusual strain;
  - (b) identifiable by time and place of occurrence;
  - (c) identifiable by member or part of the body affected; and
  - (d) caused by a specific event on a single day or during a single work shift.
- (3) "Injury" or "injured" does not mean a physical or mental condition arising from:
  - (a) emotional or mental stress; or
  - (b) a nonphysical stimulus or activity.
- (4) "Injury" or "injured" does not include a disease that is not caused by an accident.
- (5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm.

The counterpoint article in this issue, Triewiler, *supra* note 5, exaggerates the effect of the amendment to the Act in a number of factual situations. It also ignores the expansion of the definition of occupational disease.

28. See *McMahon*, 208 Mont. at 485, 678 P.2d at 663.

29. MONT. CODE ANN. § 39-72-102 (1987), in part states:

- (10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

30. *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 665 P.2d 783 (1983).

31. MONT. CODE ANN. § 39-71-407(2)(b) (1987). The 1987 amendments also restate the burden of proof in all of the traditional benefit levels of temporary total (MONT. CODE ANN. § 39-71-701(2) (1987)), permanent total (MONT. CODE ANN. § 39-71-702(2) (1987)), and permanent partial disability (MONT. CODE ANN. § 39-71-703(2) (1987)).



disease, the new law attains a modicum of necessary predictability. It also maintains the assurance that conditions caused by the workplace will be compensated. By limiting benefits for injuries but effectively enlarging compensability potential under the Occupational Disease Act, the definitions provide a more equitable apportionment of risk and cost to situations involving industrial and non-industrial causative factors. Those situations that legitimately involve minimal workplace effects will be treated appropriately as such.

Both the Workers' Compensation Act and the Occupational Disease Act now preclude compensation for mental and physical problems caused by "non-physical stimulus," that is, emotional stress.<sup>32</sup> This modification, again, provides clarity to a gray area. The choice to remove stress-caused conditions from the Act is a tough one, perhaps one of the more difficult but necessary balancing considerations of the reform movement.

The removal of mental-mental and mental-physical claims from compensability is not as radical as some might argue. After all, in the eighty-one year history of the Act they have never been clearly compensable in any event. There are no statistics available, but it would not appear that the restrictions will affect any large number of claimants. The few that it does preclude are, though, likely to be very difficult and expensive cases.<sup>33</sup> This effort to reduce costs and uncertainty in a fashion affecting the least number of workers for the benefit of a much larger group is an appropriate choice.

The new definition of injury (as opposed to disease) also restricts the workers' compensation compensability of heart and lung disease. Such conditions can still be found to be occupational diseases and remain compensable as injuries so long as the specific workplace event constitutes a primary cause of the condition. Again, this was a tough choice. Again, it was a costly gray area affecting a relatively small number. Again, an appropriate balance was reached.

The vast number of claimants suffer a legitimate injury at a specific point in time while at work. These individuals are unaffected by the new definition. Those on the periphery, with claims and conditions clouded by numerous other factors, may not receive

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32. MONT. CODE ANN. § 39-71-119(3)(a) (1987).

33. Also, by closing the door on compensability for alleged stress-caused conditions, untold future expansion is probably stopped before it even begins. The nature of pure stress claims begs for unrestricted subjective opinion on causation. Once this ball began to roll, there was no stopping it without action by the legislature.

full compensation or any compensation at all. Those with solid workplace connections may well find compensation under the Occupational Disease Act. The courts will appropriately consider non-work-related causative factors. Those totally uncompensated will retain their right to pursue common law remedies if there is workplace connection and employer fault.

#### IV. BENEFITS

Benefit amendments are the most difficult area of the new law to discuss from the defense perspective. The difficulty does not arise as a result of a lack of need for change or a lack of primarily appropriate change. The difficulty arises from the fact that benefit changes, the changes that save the necessary costs in the system, always take money out of some claimant's hands. To approve of such changes leaves one wide open to broadside charges of a lack of feeling, compassion or understanding of the injured worker's predicament. As indicated previously, the changes are necessary, the decisions are tough and the goal must be to spend the dollars available appropriately and effectively. Reform cannot be guided by anecdotal example and so, regrettably, some very legitimate, although limited, difficulties will arise.

One of the fundamental changes in the workers' compensation benefit scheme is the creation of the job pool concept.<sup>34</sup> This new approach is a geographical expansion of the traditional "normal labor market" considerations to a statewide basis.<sup>35</sup> This expansion

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34. MONT. CODE ANN. § 39-71-1011(7)(a) (1987), states:

(a) "Worker's job pool" means those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as the result of the worker's injury. Lack of immediate job openings is not a factor to be considered.

35. Under previously existing law, a determination of permanent total disability required the establishment by the claimant of (a) what jobs were included in his normal labor market pre-injury, and (b) the total inability of the claimant to engage in any such normal labor market jobs due to the disability resulting from the industrial injury. *Metzger v. Chemetron Corp.*, 212 Mont. 351, 687 P.2d 1033 (1984). Likewise, normal labor market considerations were critical in determining the rate of biweekly permanent partial disability under former MONT. CODE ANN. § 39-71-703 (1985). The rate paid for the maximum duration allowable pursuant to *McDanold v. B.N. Transp., Inc.*, \_\_\_ Mont. \_\_\_, 701 P.2d 1001 (1985), *appeal after remand*, 208 Mont. 470, 679 P.2d 1188 (1984), was calculated by comparing pre-injury and post-injury earning capacities in the normal labor market. *Dunn v. Champion Int'l Corp.*, \_\_\_ Mont. \_\_\_, 720 P.2d 1186 (1986).

"Normal labor market," therefore, was a critical concept under the old law. The court applied the concept on a limited geographical area, presumably a reasonable commuting distance. Therefore, a claimant in an economically depressed rural area would fare far better than an identically situated individual in a more sizeable community.

The new definition of job pool (MONT. CODE ANN. § 29-71-1011(7)(a) (1987)) extends the

may well be an overreaction to the previous artificially-limited scope of the principle. A happy medium between the two would have been more equitable.

It is a fact that a number of workers simply do not have the choice or ability to pursue a theoretical job position on the other side of the state. Nonetheless, such individuals will be compensated as though they had. This situation presents one of the more difficult cost saving methods.

In addition to the job pool concept, the new law establishes a priority scheme for potential permanent total disability cases.<sup>36</sup> The scheme encourages return to work and discourages retraining or business establishment unless they are last resorts. The approach is a good one. It is cost effective and consistent with the policies of the Act. The emphasis of our system has, over time, veered far off the course of attempting to return the claimant to gainful employment in a cost efficient manner. Various unnecessary retraining and business schemes have permeated the court docket over the last ten years. The result has been a fundamentally misguided direction. Retraining and business ventures, when necessary, can and should be pursued. In a wage supplement oriented benefit system, they should not be pursued in derogation of legitimate return-to-work options.

Individuals found to be permanently and totally disabled will

reach of normal labor market concepts to the entire state for each case. For example, a claimant living in Yaak who would have been a permanent total disability claimant under the old standard would not be under the new law if a job existed in Miles City which he could do considering his age, education, experience and physical condition.

How can this be quantified, though? My sense is that such situations are not statistically significant. The example, though, presents the opportunity for some of the opposition's most vociferous castigation of the new law.

36. MONT. CODE ANN. § 39-71-1012 (1987), states:

Rehabilitation goal and options. (1) The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.

(2) The first appropriate option among the following must be chosen for the worker:

- (a) return to the same position;
- (b) return to a modified position;
- (c) return to a related occupation suited to the claimant's education and marketable skills;
- (d) on-the-job training;
- (e) short-term retraining program (less than 24 months);
- (f) long-term retraining program (48 months maximum); or
- (g) self-employment.

(3) Whenever possible, employment in a worker's local job pool must be considered and selected prior to consideration of employment in a worker's statewide job pool.

now receive cost-of-living increases.<sup>37</sup> This increase in benefits under the Act is most appropriate. The direction is once again consistent with the approach of increasing benefits for the most clearly disabled.

The permanent partial disability amendments repeal the former schedule of injuries which limited benefits by body part affected.<sup>38</sup> Now all events are "whole man" injuries with the maximum 500 weeks of benefits available. This increase in benefits for those whose earning ability has been legitimately affected is also most appropriate.<sup>39</sup> Such a course of action again represents an approach of more adequately compensating the mainstream claimant and more stringently putting those on the periphery to their proof.

Under the new law, as with the old, medically rated impairments are paid without contest.<sup>40</sup> Again, this direct and speedy compensation for objective damage caused by injury is appropriate.<sup>41</sup>

Complicated "earning capacity" concepts have been replaced with wage supplement benefit payments.<sup>42</sup> The benefit is designed as just that, a supplement.<sup>43</sup> Consistent with the policy of the new

37. MONT. CODE ANN. § 39-71-702(5) (1987).

38. The new permanent partial disability section, MONT. CODE ANN. § 39-71-703 (1987), simply does not mention scheduled injuries. Former MONT. CODE ANN. § 39-71-705 (1985), was repealed.

39. Under former methods of computing permanent partial disability benefits as required by either MONT. CODE ANN. § 39-71-703 (1985), or MONT. CODE ANN. §§ 39-71-705 to -709 (1985), the schedule of MONT. CODE ANN. § 39-71-705 (1985) controlled the duration of benefits regardless of severity. As a result, inequitable situations could and did result. For instance, a claimant whose permanently residual ankle fracture limited the claimant's ability to work far more than a claimant who suffered a back sprain would be limited to 180 weeks of benefits, as opposed to the maximum of 500 weeks available to the less-affected back patient.

We must keep in mind, though, that *any* duration of partial disability benefits is totally arbitrary. No duration scheme makes someone "whole." The system is unable to "make" anyone "whole" and cannot be judged by an inability to do so.

40. MONT. CODE ANN. § 39-71-703(1)(a) (1987). Each percentage of "whole man" impairment equals five weeks of benefits at the appropriate rate calculation. The award may be paid in a lump sum if the claimant desires, subject to a reduction to present value.

41. In the event a dispute exists concerning a rendered impairment rating, a panel process administered by the Division of Workers' Compensation has been established. MONT. CODE ANN. § 39-71-711 (1987). This approach is untested. The panel is one of the examples of the administration's attempt to create more bureaucracy to circumvent the court process. If handled fairly and expeditiously by the Division, the procedure will meet its stated goal. Looking at past performance, one is necessarily suspect of the chance of success of any duty delegated to the Division.

42. MONT. CODE ANN. § 39-71-703(1)(b) (1987).

43. Supplements are calculated on the basis of comparing "actual wages" at the time of injury to the "wages the worker is qualified to earn" post-injury. For some reason, administration officials refused to acknowledge this approach as dealing with earning capacity. In fact, the changes do exclude pre-injury capacity concepts by mandating the use of the actual

law, these permanent partial disability benefits are the product of a quick and simple computation and are subject to delivery without undue delay or litigation. The countervailing benefit is certainty, timeliness and cost savings. Detractors again may argue that such an approach does not make the claimant whole. Of course, it does not. No system can. The "old" law did not, and neither does the new, nor could any other system of workers' compensation partial disability benefits.

If a worker is not returned to work, a new total disability benefit is paid during the period in which his work potential is evaluated.<sup>44</sup> Thereafter, if rehabilitation services are arranged, the worker will continue to receive full benefits and auxiliary assistance with incidental expenses.<sup>45</sup> Such an approach fosters complete evaluation and payment of appropriate benefits under the new scheme. It also bolsters the fundamental goal of prompt return to work.

The social security retirement cut-off statutes codify and expand recent court approaches to make that aspect of the system more realistic.<sup>46</sup> If a worker is retired, the argument for compensat-

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wages. The post-injury calculation, based on an amount the claimant is "qualified" to earn, is certainly a "capacity" consideration.

Additional certainty is added to the system by limiting the claimant's entitlement to a period of 500 weeks beginning on the date of medical stability. This change solidly fixes the potential exposure on any claim.

44. MONT. CODE ANN. § 39-71-1023 (1987). The benefit is paid for a period up to 26 weeks at the total disability rate.

The work potential is evaluated by a rehabilitation panel created pursuant to MONT. CODE ANN. §§ 39-71-1016 to -1018 (1987). The whole panel approach is caught up in a maze of hard-to-understand statutory reform that no doubt will be considered by the courts repeatedly. The approach is subject to significant reservations. See *supra* note 41. Under any circumstances, the approach begs for clarification and streamlining.

During the preparation of this article, it has become apparent that the Division of Workers' Compensation is inappropriately interpreting the obligation of carriers to pay the total rehabilitation benefit in some cases. The Division seems to be directing payment of such benefits in all cases where the claimant has reached medical stability and is not able to return to his or her former position either because of inability or unavailability. In so doing, the Division is ignoring the supreme court holding in *Coles v. 7-11 Stores*, \_\_\_ Mont. \_\_\_, 704 P.2d 1048 (1985), and the statutory basis for such benefits. In addition, the Division is ignoring its own Rule, ADMIN. R. MONT. 24.29.1702(2)(b), which presupposes the possibility of a claimant appearing before the rehabilitation panel without receiving the total rehabilitation benefit payments.

The continued viability of the *Coles* criteria cannot be questioned. The ability of a carrier to properly reduce the claimant from total disability to partial disability benefits, under appropriate circumstances, pending review by the rehabilitation panel, is soundly based in the new amendments. It is quite troubling that the Division, who fought so hard for reform, chooses to stifle its application upon every opportunity presented.

45. MONT. CODE ANN. §§ 39-71-1024, 1025 (1987).

46. MONT. CODE ANN. § 39-71-710 (1987) provides that:

(1) If a claimant is receiving disability or rehabilitation compensation benefits and

ing him for his long-term loss of actual earnings is not present, so long as his temporary total status, impairment and medical benefits are fully covered. This is certainly another example of appropriate but more limited coverage for a small percentage of the total number of claimants in order to benefit the majority.

Perhaps the sole greatest cost savings in the new system is the limitation of lump sums and the requirement of present value reduction when cases are settled.<sup>47</sup> The past abuse of the lump sum settlement procedure caused a drain of untold proportions on the system. The refusal to apply the necessary concept of reducing future dollars paid today to present value ignored economic reality. These new provisions will not eradicate lump sums or settlements. As the system develops, cases will continue to be closed and lump sums paid. They will, however, represent a more sound economic approach.

All in all, the benefit reductions are sound and produce the least hardship to a small number of individuals. Benefit increases are appropriately placed through the necessary balancing process. Though the bureaucratic processes of the impairment panel and rehabilitation services need to be revamped somewhat, the tough decisions were made and the system will begin to rebound as a result.

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the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent total disability, and rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

(2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

The inconsistent language utilized begs for technical clarification, though.

47. MONT. CODE ANN. § 39-71-741 (1987). The new approach limits all lump sums on partial cases. No lump sum can be paid without the agreement of the carrier. Significant limitations are also present in advance payments for total disability cases. [See Comment, *1987 Changes to Lump Sum Payment Provisions in the Montana Workers' Compensation Act*, this issue, for discussion. —Ed.]

During the period in which the system was being studied and during the time that the legislation was being debated, it appeared that all proponents of reform were uniformly supporting voluntary settlements. As noted above, such settlements, lump sum payments, would only be possible if the carrier agreed. This, of course, is the form of the amendment to Section 741.

As this article is being prepared, we see the Division of Workers' Compensation repeatedly refusing to approve settlements under the "new act." The ostensible reasons for these refusals appear fluid and inconsistent. Again, for some reason, the Division appears to be attempting to thwart reform which it sponsored and supported previously.

## V. DISPUTE RESOLUTION PROCESSES

By the early 1980s the Workers' Compensation Court was over utilized. Too high a percentage of claims found their way to the court.<sup>48</sup> The influx of litigation was caused by the large sums of money available, persistent inconsistencies in judicial holdings and exorbitant attorney's fees. The litigation process was often initiated prematurely.<sup>49</sup>

The new Act requires an attempt at informal dispute resolution through "documented demand."<sup>50</sup> Such a process requires a prospective litigant to evaluate and document his position. This change was sorely needed and is a very positive development if properly utilized and enforced.

Non-binding mediation<sup>51</sup> compels further evaluation and case preparation which can lead only to more frequent early resolution of problems. The strength of mediation is directly proportional to the quality of the mediators and to the efforts of the parties. We are already seeing the benefits of properly conducted mediation.<sup>52</sup> Regrettably, we are also already seeing the utter waste of time in the process when the parties or the mediator are not serious about the proceeding or are not fully prepared.<sup>53</sup> The concept is a good one and should be strengthened rather than watered down.

Counsel on both sides of the claim may personally benefit by

48. See *supra* note 4.

49. The court refused to construe strictly the statute as requiring that a "controversy" exist before jurisdiction arose. This resulted in claims first being brought to the attention of an employer in the form of a court petition. The council later recommended the informal dispute resolution requirements, which were added to the Act. RECOMMENDATIONS, *supra* note 8, at 52-53.

50. MONT. CODE ANN. § 39-71-2401 (1987).

51. MONT. CODE ANN. §§ 39-71-2406 to -2411 (1987). During the preparation of this article, the Montana Supreme Court decided *Carmichael v. Workers' Comp. Ct.*, \_\_\_ Mont. \_\_\_, 763 P.2d 1122 (1988). The court refused to apply mandatory mediation to claims for injuries occurring before July 1, 1987, the effective date of the reform amendments.

52. My personal experience indicates that where there is proper disclosure, competent and prepared counsel, and active support by the mediator, a very high percentage of cases have settled.

53. When attorneys approach mediation as only a necessary delay and do not provide sufficient documentation or adequately evaluate the case, mediation rarely works. Part of the problem is that the rules do not provide sufficient direction to the parties. It is suggested that the court, by order, or the Department of Labor, by promulgation, adopt more specific guidelines and sanctions to thwart this attitude.

In a few cases the mediator has been satisfied to simply hear the arguments and make a recommendation that is nothing more than a baby-splitting exercise. This is not frequent, however. An effective mediation requires a mediator who knows the law and facts and who encourages a legitimate discussion of the issues being mediated. The mediator's recommendation should be detailed, relying on the parties' arguments and providing a solid rationale for the recommendation. Regulations should require this approach.

not seriously utilizing the mediation process. Their clients do not. All counsel would be serving their clients and the system by earnestly and appropriately utilizing the process. Those few who, for personal gain or spite, seek to thwart the process without good cause should be called to account.

The administration's initial reform proposals sought to do away with the Workers' Compensation Court and establish another unmanageable bureaucracy.<sup>54</sup> This approach was misguided. It was primarily fostered by the Division's paranoia and repeated claims that attorneys and courts were the cause of all that was bad in the world of workers' compensation. No small part of the Division's public ire appeared to be a well-placed smoke screen to justify or allegedly account for the unbelievable deficit that had surfaced on the books of the State Compensation Insurance Fund.<sup>55</sup>

There is no question that the Workers' Compensation Court should be retained. The court presents a specialized forum for adjudication of very technical legal and medical matters. The attempt to reinsert the district courts into the workers' compensation arena at an appeal level in a multi-phased bureaucratic quagmire was ill-conceived and contrary to the good sense of anyone who has dealt with the Montana system in the last decade. In many cases the court provides very necessary impartial protection from the Division itself.

The 1987 amendments not only retain the court, but also strengthen it in a number of important ways. The judges of the Workers' Compensation Court were granted new powers consistent with those of a district court judge to maintain order and compel obedience to court orders.<sup>56</sup> In a move that guarantees more consistency in its proceedings, the court is now required to follow the Montana Rules of Evidence.<sup>57</sup> Finally, a provision consistent with Rule 11 of the Montana Rules of Civil Procedure was enacted to help assure that those involving themselves in the court process will present and maintain only those positions and actions which are appropriate.<sup>58</sup>

The entire dispute resolution process provides a framework designed to assist those involved in the system to resolve their disputes in a timely and equitable fashion. The new process will re-

54. S.B. 315, 50th Sess., ch. 464, 1987 Mont. Laws 1.

55. The State Compensation Insurance Fund suffers from an unfunded liability estimated at 150 million dollars in 1987. MCKINNEY, *supra* note 2, at 4.

56. MONT. CODE ANN. § 39-71-2901 (1987).

57. MONT. CODE ANN. § 39-71-2903 (1987).

58. MONT. CODE ANN. § 39-71-2914 (1987).



duce litigation and assist in meeting the goal of efficient and speedy delivery of benefits.

The system is not perfect and needs some fine tuning in relation to required efforts and evidence at mediation, more stringent guidelines for participation by the parties and a fixed framework for the mediator's involvement. A number of the remaining procedural problems with the Workers' Compensation Court system can be handled adequately through a comprehensive reworking of the court's rules.

Many of the detractors of the new process, having become accustomed to running to the court at every turn, may point to the time element as a deficiency in the new system. Many of these same individuals were content to litigate every action, incur the significant monetary and emotional cost to the claimant, and sit by for a longer period of time awaiting a decision from the overburdened court.

The direction of the new dispute resolution process is one which fosters early evaluation, discussion and mutual compromise. This is most appropriate. This direction is superior to past practices.

## VI. CONCLUSION

Unquestionably, some claimants receive less under the new law than under the old. Some claimants receive nothing under the new Act although they would have under the old. Most claimants, those in the mainstream of the system, however, are adequately and fairly protected and in a few very important areas receive greater benefits under the new Act.

The new workers' compensation system is designed to work on a budget that is more realistic. In the long run, such an approach improves the lot of the working person by assisting in the rebuilding of a strong and viable system. We see on the national budget deficit scene individuals who espouse responsible belt-tightening but do not have the stomach to effect such an effort. Our legislature accepted the challenge. Even with the inevitable fine-tuning and modification necessary with a new approach, we are much better off today than yesterday and the system is proceeding in the right direction.